91-773
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No. ________

In The

# Supreme Court of the United States

October Term, 1991

SHAKLEE U.S., INC.,

*Plaintiff and Counter-Defendant-Appellee*

vs.

ROBERT G. GIDDENS, JR.,

*Defendant and Counter-Plaintiff-Appellant*

**Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PETITION FOR WRIT OF CERTIORARI


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## QUESTION PRESENTED

I. DID THE COURT OF APPEALS AND DISTRICT COURT ERR IN DETERMINING GENUINE ISSUES OF MATERIAL FACT IN RESOLVING A CONTRACT DISPUTE IN FAVOR OF THE PARTY MOVING FOR SUMMARY JUDGMENT UNDER FED. R. CIV. P. 56?

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Robert G. Giddens, Jr., respectfully requests this Court to grant the Petition for Writ of Certiorari, seeking review of the Court of Appeals' and District Court's Opinions.

## OPINIONS AND JUDGMENTS DELIVERED BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is unreported and is printed in Appendix A hereto, *infra,* pages 1-8. The memorandum and decision of order of the United States District Court for the Northern District of California is printed in Appendix A hereto, *infra,* pages 9-24. The order of the United States Court of Appeals for the Ninth Circuit denying the petition for rehearing is printed in Appendix C hereto, *infra,* page 28. The judgment of the United States District Court for the Northern District of California is printed in Appendix C hereto, *infra,* pages 29-31. The transcript of proceedings in the United States District Court for the Northern District of California is printed in Appendix C hereto, *infra,* pages 32-55.

## JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit (Appendix A, *infra,* pages 1-8) was entered on May 30, 1991. The order of the United States Court of Appeals for the Ninth Circuit denying the petition for rehearing (Appendix C, *infra,* page 28) was entered on August 13, 1991. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

Petitioner challenges the summary judgment entered pursuant to Fed. R. Civ. P. 56, (Appendix B, *infra*, pages 25-27), which was entered in favor of the moving party, respondent. Specifically, petitioner argues that the court of appeals and district court erred in resolving disputed questions of fact regarding whether Shaklee could modify its contract with Giddens without consideration and without an opportunity for Giddens to reject the proposed modification.

## STATEMENT OF CASE

This appeal involves the termination of the distributorship of Robert G. Giddens, Jr., by Shaklee U.S., Inc. Shaklee is a multi-level marketing company which sells consumer products through a vast network of independent contractors, who Shaklee calls distributors. At issue is Giddens' contract with Shaklee and whether Shaklee had the right to unilaterally modify its contract with Giddens to preclude him from selling other noncompeting products.

### Robert Giddens' Introduction to Shaklee

Robert Giddens is a former Amway distributor who became a Shaklee distributor in November 1970. Giddens asked the Shaklee distributors who recruited him if he could continue his Amway business if he became a Shaklee distributor, and he was told that he could. (CR 119; Giddens dep., p. 499.)[1] After attending a Shaklee meeting

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[1] References to the record reflect the docket entries of the district court and a description of the document referenced.

and discussing the Shaklee opportunity with other distributors for about 13 hours, Robert Giddens signed a Shaklee Distributorship Application. (CR 119; Giddens dep., p. 494.) (CR 118; Exhibit A.) This Application was approved by Shaklee.

**The Distributorship Application**

The Application did not state that Shaklee or the distributor could terminate the distributorship at will, but instead provided that Shaklee could cancel if the agreement or "any company rule" was violated. (CR 118; Exhibit D, Shaklee's Answers to Giddens' First Requests to Admit, ¶ 50.) (CR 118; Exhibit A.) The Application also did not provide notice that Shaklee could change company rules and have those changes apply retroactively. Finally, the Application did not prohibit distributors from selling another company's products during their tenure as Shaklee distributors. (CR 118; Exhibit A.)

**The Sales Manual**

After signing his Distributorship Application, Giddens was given a copy of Shaklee's Sales Manual. The Sales Manual similarly did not prohibit distributors from selling the products or promoting the opportunities of other direct sales companies. (CR 118; Exhibit D, ¶ 22.) In fact, the Sales Manual at the time stated that "since you are in business for yourself it is up to you, and you alone, to decide where and to whom you sell." (CR 118; Exhibit D, ¶ 18.)

**The Privileges & Responsibilities Manual**

Shaklee also had a Privileges & Responsibilities Manual ("P&R") in effect in 1970. However, the P&R was not presented to new distributors. It was Shaklee's policy to provide the manual only after distributors reached the rank of Supervisor. (CR 122; Simon dep., p. 209.) Nevertheless, the P&R in effect at the time Giddens became a Shaklee distributor contained no prohibition against selling the products or promoting the opportunities of another direct selling company. (CR 119; Farren dep., p. 44.) Giddens' Application and the 1970 P&R both indicated that Shaklee distributors could be terminated only for good cause. (CR 118; Exhibit T, pp. 9, 10, & 32.)

On July 24, 1974, Larry Farren, then Director of Legal Services for Shaklee, confirmed in a letter to the Federal Trade Commission that the company did not prohibit distributors from dealing in other products, competitive or otherwise. (CR 118; Exhibit E.) (CR 119; Farren dep., p. 55.) As late as November 2, 1981, Carolyn Kjobech, a Shaklee Field Administration Supervisor, informed Shaklee sales leaders that they could engage in businesses which were in direct competition with Shaklee. (CR 118; Exhibit F.) (CR 119; Farren dep., p. 70.)

Shaklee first adopted a provision in its P&R prohibiting what Shaklee classified as "unethical business practices" in 1982, 12 years after Giddens joined Shaklee. (CR 118; Exhibit D, ¶ 28.) In an explanation of the P&R sent to distributors, Shaklee explained that distributors could be involved in another competitive business, so long as their Shaklee business was not combined with the other business. (CR 118; Exhibit G.) Giddens was told by Shaklee's in-house counsel and other Shaklee agents that this rule was unenforceable.

At the time the new P&R was promulgated, Shaklee neither requested Giddens to sign a new distributorship agreement, nor asked Giddens to acknowledge receipt of the new P&R. Nor did Giddens receive any additional compensation as a consequence of Shaklee's promulgation of the "unethical business practices" rule. The new P&R was simply promulgated by Shaklee and sent to distributors, with no opportunity for acceptance or rejection.

**The Sales Plan**

Compensation from the Shaklee opportunity is primarily two-fold. First, distributors earn a bonus based on the dollar amount of products they purchase. If a distributor maintains a certain purchase volume for three consecutive months, he qualifies as a Supervisor. The second and more lucrative bonus program is based upon the sales of persons who are recruited into the Shaklee organization. These bonus payments are calculated on the purchases of Supervisors sponsored by another Shaklee Family Member.

Coordinator is the next step in the Shaklee rankings. To become a Coordinator, a Supervisor must have sponsored four or more first level Supervisors. According to the Shaklee Sales Plan effective in 1981, when one has held the rank of Coordinator for 12 consecutive months, he may choose to retire. (CR 118; Exhibit H, SHO3386.) The retirement benefit includes 50 percent of the bonus payments from the Coordinator's first level Supervisors. (CR 119; Farren dep., pp. 160-161.) Giddens signed his Distributorship Application with the assurance that he would have this retirement benefit.

The next rank in the Shaklee field hierarchy is Key Coordinator. According to the 1981 Sales Plan, "the prestigious title of Key Coordinator is bestowed by Shaklee when you have qualified nine or more first level Supervisors within your sales organization and demonstrated superior leadership qualities." (CR 118; Exhibit H, SHO3387.)

The pinnacle of Shaklee's success is the rank of Master Coordinator. (CR 118; Exhibit H, SHO3389.) To become a Master Coordinator, a Shaklee Family Member must have sponsored and maintained 15 first level Supervisors.

Around 1981, Shaklee created a new classification called Lifetime Master Coordinator to recognize those persons who had maintained the rank of Master Coordinator for 10 consecutive years. (CR 119; Giddens dep., p. 473.) Lifetime Master Coordinators are entitled to attend all Shaklee conventions, receive a free lease car every two years, and are exempt from monthly minimum purchase volume requirements. Al Simon, President of Shaklee, estimated that only 20 people have achieved the rank of Lifetime Master Coordinator and estimated that there are currently about 1.5 million Shaklee distributors. (CR 119; Simon dep., pp. 80-81.)

**Robert Giddens' Road to Success**

Giddens became a Shaklee distributor in November 1970, achieved the rank of Coordinator in 1971, and the rank of Key Coordinator by 1972. As early as 1973, Giddens achieved the rank of Master Coordinator, and became a Lifetime Master Coordinator in 1983. Shaklee frequently publicized Giddens' meteoric rise to the top as

a symbol of the superiority of the Shaklee opportunity. (CR 118; Exhibit L.)

During the period from 1971 to 1981, Shaklee's U.S. sales increased each year. However, U.S. sales peaked in 1981 and were essentially level in 1982 and 1983. (CR 118; Exhibit M, Plaintiff's Objections and Responses to Giddens' Second Interrogatories, ¶ 2.) As Shaklee sales began to level off, Giddens became increasingly active in suggesting changes to the Sales Plan and the marketing of Shaklee products. When the sales trend did not improve, Giddens was privately critical of management in general and of Al Simon, President of Shaklee, in particular. (CR 119; Giddens' dep., p. 596.) (CR 118; Exhibit N.) During this period, however, Giddens continued to promote the Shaklee opportunity to new recruits and continued to motivate his downline distributors. (CR 119; Simon dep., pp. 275-276.)

**K-Comp**

In 1982, Giddens began selling for a company known as K-Comp, another multi-level direct sales company. Shaklee's Vice President of Sales at that time asked Giddens to stop selling the K-Comp product. (CR 122; Giddens dep., p. 155.) Giddens did not respond to the request because he did not consider his K-Comp activities to be unsupportive of Shaklee. (CR 122; Giddens dep., p. 158.) Giddens eventually did resign from K-Comp some months later because the company was floundering. In a letter to K-Comp, Giddens stated that he was leaving for personal reasons. (CR 122; Giddens dep., pp. 155-158.) (CR 122; Exhibit G, p. 2.)

**ATR and Eagle Shield**

In October 1987, Giddens became involved in a company called ATR, another multi-level company which sold pre-paid tax audit protection. (CR 119; Giddens dep., p. 193.) Giddens became involved in ATR because it did not offer a product or service that competed with Shaklee. (CR 119; Giddens dep., p. 193.) He ended his involvement with ATR in May 1988. (CR 119; Giddens dep., p. 195.) Of the thousands of people to whom Giddens sent ATR promotional material, approximately 50 were current or former Shaklee distributors. (CR 119; Giddens dep., p. 203.) Giddens did not discuss Shaklee when attempting to recruit people into ATR and did not suggest that there was any relationship between Shaklee and ATR, nor did Giddens advocate that Shaklee distributors resign from Shaklee to join ATR. (CR 119; Giddens dep., p. 262.)

In February 1988, Giddens became involved in a multi-level direct selling company called Eagle Shield. Similar to ATR, Eagle Shield sold a product that did not compete with any of the products offered by Shaklee.

**Shaklee's Retaliation**

Shaklee first threatened disciplinary action against Giddens for being overly critical of management. (CR 119; Giddens dep., p. 593.) A month later, in October 1987, Al Simon asked Giddens whether he was involved in selling ATR. When Giddens responded, "What I do in my free time is none of your business," Shaklee again threatened disciplinary action. (CR 119; Giddens dep., p. 590.)

In March 1988, a letter was sent to Giddens by Shaklee's Vice President of Sales stating that Shaklee was considering disciplinary action, including termination. (CR 118; Exhibit Q.) The letter suggested that Giddens fly to San Francisco to discuss the situation. (CR 118; Exhibit Q.) Giddens' former counsel responded to the letter by denying the allegation that Giddens was in violation of his contract with Shaklee and by requesting additional information regarding Shaklee's contentions. (CR 118; Exhibit R.) Shaklee responded in a letter dated April 12, 1988. The letter ignored the request for additional information and set forth the following disciplinary action taken against Giddens:

> 1) Your distributorship is hereby reverted from the sales rank of Lifetime Master Coordinator to the rank of Supervisor.
> 2) Your special Master Coordinator Shaklee bonus car is hereby terminated and must be returned to Shaklee.
> 3) Your distributorship is not in good standing and is no longer eligible for participation at any Shaklee convention, event or sales meeting sponsored by Shaklee.
> 4) Your distributorship's special leadership bonuses will be continued temporarily pending resolution of our action to terminate your distributorship.

(CR 118; Exhibit 5.)

The disciplinary action taken was purportedly based upon Section 4 of the Shaklee P&R Manual adopted in 1985. (CR 118; Exhibit T.) That Section states in pertinent part:

> Shaklee Family Members may not abuse their Shaklee distributorship by using it for the

purpose of engaging in unfair competitive activity. In particular, if any Shaklee Family Members shift their interests toward building a sales organization in another direct selling company, then they should not masquerade as Shaklee members to gain access to other Shaklee members, but should resign their Shaklee distributorship before soliciting any Shaklee members to join another direct selling organization. A Shaklee Family Member may not promote, directly or indirectly, another direct selling company or its products while remaining a Shaklee Family Member.

**Course of Proceedings Below**

On the same day that the April 1988 letter was sent, Shaklee filed a Complaint for Declaratory Relief and Request for Preliminary Injunction with the district court. When the preliminary injunction was denied, Shaklee terminated Giddens' distributorship effective July 6, 1988.

Shaklee then filed a Complaint, followed by an Amended Complaint, against Giddens, and Giddens filed a Counterclaim against Shaklee. Jurisdiction was in the United States district court pursuant to 28 U.S.C. § 1332(a)(1). Shaklee and Giddens both filed motions for summary judgment on November 30, 1989. The district court issued a Proposed Memorandum of Decision and Order on the summary judgment motions on January 16, 1990. Three days later, the court heard oral argument, and subsequently entered a Memorandum of Decision and Order that was unchanged from the Proposed Order. (CR 135.) The Order dismissed all counts of Giddens' Counterclaim with the exception of Giddens' conversion claim. Giddens appealed to the United States Court of Appeals for the Ninth Circuit on the basis that the district court

resolved genuine issues of material fact in favor of the moving party, Shaklee. On May 30, 1991, the court of appeals issued a per curiam, non-published opinion, affirming the district court. Giddens petitioned the court of appeals for rehearing on the basis that the court ignored issues of law and material fact, and resolved genuine issues of material fact in favor of the moving party, Shaklee. The petition for rehearing was denied August 13, 1991.

## REASONS FOR GRANTING THE WRIT

### I. There Are Special And Important Reasons For This Honorable Court To Grant The Writ Of Certiorari

This case warrants review because the decisions of the court of appeals and district court far exceed their powers to grant summary judgment, and usurp the role of the ultimate trier of fact by deciding genuine issues of material fact. This case is a profound example of lower courts abusing unrestrained and confusing powers in deciding a motion for summary judgment.[2] It is therefore

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[2] In a trilogy of cases addressing the standards for presenting a claim to the ultimate trier of fact, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), the Supreme Court significantly expanded the ability of the district court to grant summary judgment under Fed. R. Civ. P. 56. This trilogy moves decisively beyond the traditional position that the district court, reviewing a motion for summary judgment, acts as a guarantor that issues of material fact will actually be in dispute in order to submit the case to the jury. Rather, the cases expand the discretion of the court by giving the judge broad pretrial evidentiary review. *Second Thoughts About Summary Judgment*, 100 Yale L.J. 73, 84 (1990).

a perfect opportunity for this Court to retreat from the unlimited position expounded in the 1986 trilogy of cases and impose some restraint on the uncontrolled discretion of the courts to invade the province of the jury.

As a consequence of the 1986 trilogy of cases, the Court transformed summary judgment from a mechanism for assuring genuine dispute in a case set for trial to a replacement of trial with legal burdens and evidentiary standards to match those at trial. The result is that a judge, in hearing a motion for summary judgment, acts as a complete substitute for trial by jury. *Second Thoughts About Summary Judgment*, 100 Yale L.J. 73, 87 (1990). Yet the legal burdens and evidentiary standards that would apply at trial are actually made *less* onerous for the moving party in a motion for summary judgment. When the nonmoving party will have the burden of proof at trial, the party moving for summary judgment can now meet its initial burden simply by pointing out to the court that there is an absence of evidence in the record to support the nonmoving party's case. *One Step Forward, Two Steps Back: Summary Judgment After Celotex*, 40 Hastings L.J. 53, 55 (1988). This shifting of burdens is substantial and in open contradiction to the traditional standards developed in a motion for summary judgment. After the 1986 trilogy, the party moving for summary judgment now has no burden. Yet the party opposing the motion, the party in whose favor all reasonable inferences are supposedly to be drawn, must be prepared to present a full case that would convince the judge of assured victory at trial.

The issue after the 1986 trilogy is no longer whether enough evidence exists to raise a reasonable inference to be resolved at trial, but whether enough evidence at the

summary judgment stage exists to convince the judge that the plaintiff will absolutely win at trial. *A New Era For Summary Judgment: Recent Shifts at the Supreme Court*, 116 F.R.D. 183, 186 (1987). This necessarily requires the judge to inquire "whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict." *Anderson* at 252. Yet, under the traditional summary judgment standard, and in cases following the confusing 1986 trilogy, the function of the district court on a motion for summary judgment is *not* to determine which party's position is supported by a preponderance of the evidence. *Zuchel v. Spinharney*, 890 F.2d 273, 275 (10th Cir. 1989); *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 9 (1st Cir. 1990).

Contrary to the traditional standards in a motion for summary judgment, and contrary to many post-1986 trilogy cases, persuasiveness and plausibility are now considered and weighed by the court. This means that the judge is now weighing and deciding between those inferences that were (and are) to be drawn in favor of the nonmoving party and determining in his mind their absolute reasonableness and persuasiveness. *Id.* at 187. The judge is now free to take the case away from the ultimate trier of fact if the judge subjectively decides that the nonmovant's interpretation of evidence is unreasonable. Yet in doing so, the judge impermissibly chooses among competing inferences, regardless of whether one is more plausible than the other. *Summary Judgment and Circumstantial Evidence*, 40 Stanford L. Rev. 491, 494 (1988). This again replaces the usual rule that a plaintiff is entitled to have all reasonable inferences drawn in his favor, with a standard that suggests that, if the judge happens to find

one inference more plausible than the other, he may grant summary judgment. *Id.* at 497-498.

Such uncontrolled and arbitrary power in the hands of the judge usurps the jury's role to weigh the evidence and inferences and make ultimate findings of fact, and infringes upon the nonmovant's seventh amendment right to a jury trial. Furthermore, the Court's holdings in the 1986 trilogy that, even if the plaintiff's inference is reasonable, it may still be defeated by an equally plausible explanation, no longer permits the plaintiff to have the advantage of any reasonable inferences that could be drawn. This is flatly contradictory to the traditional summary judgment rule which states that, once an inference has been determined to be reasonable, the judge *may not* weigh those alternatives. *Id.* at 501. The judge *may not* weigh the movant's evidence against that of the nonmoving party. *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656, 659 (7th Cir. 1987). Deciding which inference is "correct" calls for a determination by the trier of fact, and the judge *may not* weigh those fact inferences. *United Indus. Corp. v. Nuclear Corp. of America*, 43 F.R.D. 30, 31 (S.D.N.Y. 1967); *Amalgamated, Inc. v. Underwriters at Lloyds*, 724 F. Supp. 1132 (S.D.N.Y. 1989).

Five years have passed since the Court transformed the clear and traditional summary judgment standard in the 1986 trilogy, and this case presents the perfect opportunity for this Court to define with clarity the limits of a district court in granting summary judgment. Post-trilogy case law shows that summary judgment has moved beyond its originally clear role as a guarantor of the existence of issues of material fact, to a confusing state where the lower courts contradict themselves and are no longer aware of their limits in deciding a motion for

summary judgment. Consequently, courts are granting summary judgment where the nonmovant is unable to convince the judge that he would win the case if it came to trial. *Second Thoughts About Summary Judgment,* 100 Yale L.J. 73, 89-90 (1990).

As discussed in the following section of this Petition, this case is a striking example of the absolutely unlimited powers the district courts believe they have in granting summary judgment. In the guise of resolving issues of law as applied to accepted or uncontroverted facts, the lower courts in this case actually resolved numerous issues of material fact in favor of the party moving for summary disposition. This case demonstrates the extreme lack of restraint exercised by courts in usurping the reserved role of the jury in response to summary judgment motions.

As another example of the need for this Court to clarify the summary judgment standards, there exists case law following the 1986 trilogy which holds that "summary judgment cannot be sustained merely because the judge believes that the party against whom it is entered is unlikely to prevail on the merits after a trial." *Jaroslawicz v. Seedman,* 528 F.2d 727, 731 (2nd Cir. 1975); *See also Donahue v. Windsor Locks Bd. of Fire Comm'rs,* 834 F.2d 54 (2nd Cir. 1987); *McKenzie v. Davenport-Harris Funeral Home,* 834 F.2d 930 (11th Cir. 1987). It is not enough that the judge has doubts about the viability of some of the nonmoving party's theories for recovery. So long as there remains reasonable inferences, the fact that the judge may feel more in sympathy with one party's view of the facts than with the other party's is irrelevant. *Harford v. Smith,* 272 F. Supp. 831 (N.D.W. Va. 1967). The

courts are in conflict regarding what powers they possess. Do the judges have unlimited power to weigh evidence, as some believe from the 1986 trilogy, or must they refrain from invading this clearly delineated role of the jury?

Under the broad and confusing standards taken from the 1986 trilogy, we now assume that judges' estimates regarding witness credibility and other fact determinations somehow accurately correspond to the true balance of probabilities. Therefore, a judge should arguably be able to take a case from the jury every time he finds that one party's inferences are even slightly more plausible than the other party's (which is virtually every case). This completely eliminates the need for a jury because a contrary finding by the jury would necessarily be unreasonable and therefore impermissible. Judges *do not* possess such accuracy in estimating inferences and probabilities. That is the purpose and role of juries. Therefore, a judge must permit cases to go to the jury, even when he thinks that the nonmovant's reasonable inference may not be the more plausible one. *Summary Judgment and Circumstantial Evidence,* 40 Stanford L. Rev. 491, 504 (1988).

It has been said, both prior to and following the 1986 trilogy, that where the nonmoving party would at trial carry the burden of proof, he is entitled to have the following: the credibility of the evidence he presents assumed; his version of all that is in dispute accepted; all internal conflicts resolved favorably to him; the most favorable of possible alternative inferences drawn in his behalf; and finally, to be given the benefit of all favorable legal theories invoked by the evidence so considered. *Charbonnages de France v. Smith,* 597 F.2d 406, 414 (4th Cir. 1979); *Greenberg v. Puerto Rico Maritime Shipping Auth.,*

835 F.2d 932, 936 (1st Cir. 1987). Is this still the standard, or does the judge have the unlimited power to take the case out of the hands of the jury any time he feels that the nonmoving party has not presented enough evidence to convince him that the party will win at trial? This case presents the Honorable Court with the opportunity to answer this and other aforementioned questions. Petitioner prays that the Court will no longer permit judges to exercise this unrestrained power, and that it will revisit and define reasonable standards for summary judgment.

## II. The Court of Appeals and District Court Erred in Their Rulings

### A. Questions of Fact Existed Over Whether Giddens was Bound by Shaklee's Unilateral Promulgation of Its Unfair Competition Rule.

The single most significant fact in this case is not even mentioned in the lower courts' opinions. That fact is that when Giddens was recruited to join Shaklee, there was no rule prohibiting distributors from selling other multi-level products.

Shaklee has acknowledged that its only written contract with Giddens did not prohibit the activity for which he was terminated. In 1970, when Giddens signed his Distributorship Application, Shaklee had no rule prohibiting outside sales activities for other direct sales companies. In fact, Giddens was an active Amway distributor at the time Shaklee approved his Distributorship Application. Giddens specifically asked if he could remain an Amway distributor if he signed up with Shaklee, and he was assured that he could. (CR 119; Giddens dep., pp.

498-499.) These facts support Giddens' claim that Shaklee's change in policy to prohibit distributors from promoting other direct sales products was not within the contemplation of the parties when Giddens signed his contract with Shaklee. This indicates, at the very least, that there exists a question regarding the intent of the parties involved in this contract dispute. Cases both prior to and following the 1986 trilogy state that questions of contractual intent are considered issues of fact which are precluded from determination by way of summary judgment. *DeValk Lincoln Mercury, Inc. v. Ford Motor Co.*, 811 F.2d 326 (7th Cir. 1987); *Peoples Outfitting Co. v. General Elec. Credit Corp.*, 549 F.2d 42 (7th Cir. 1977).

Shaklee's first attempt to restrict its distributors' right to sell other products occurred in 1982. Shaklee promulgated a new P&R which prohibited distributors from combining their Shaklee business with another direct sales business. (CR 118; Exhibit G.) At that time, Shaklee did not request Giddens to sign a new Distributorship Agreement. Nor did Shaklee even request Giddens to acknowledge receipt of the new P&R. The new P&R was simply promulgated by Shaklee and sent to distributors. Yet, while Shaklee specifically reserved the right to make additions to its bonus regulations and ordering procedures when Giddens joined Shaklee, no such reservation was made with respect to company rules. This fact supports Giddens' claim that his agreement to abide by "any" company rule did *not* include rules unilaterally promulgated by Shaklee which were contrary to the rules in existence at the time Giddens signed his contract. This again raises a question of contractual intent which is precluded from determination via summary judgment.

Giddens does not take issue with Shaklee's right to change its policies for new distributors, but Giddens does claim that significant revisions to Shaklee's policies should not apply retroactively to distributors who are not given the opportunity to accept or reject the change. Not only did Giddens have no opportunity to accept or reject the new P&R, he was also told by Shaklee's in-house counsel and other Shaklee agents that the unfair competition rule was unenforceable. Therefore, Giddens had no obligation to even challenge the rule when it was promulgated in the new P&R.

Modifications of an existing contract are enforceable only if accepted, and only if accompanied by a sufficient consideration. The general rule has been stated as follows:

> A secondary contract of employment must be supported by sufficient consideration, since it is in legal contemplation an independent contract requiring for its validity all the necessary elements of a contract.

53 AM. JUR. 2d *Master and Servant* § 19 (1970).

In this case, the lower courts weighed Giddens' claims against Shaklee's and decided that both acceptance and consideration existed in the bonuses that Giddens continued to receive after the rule was modified in the 1982 P&R. (Appendix 13, n. 3.) However, the continued receipt of benefits has been rejected as sufficient consideration by the courts confronting this argument. *Thompson v. Kings Entertainment Co.*, 674 F. Supp. 1194 (E.D. Va. 1987).

Giddens devoted the majority of his working years to building his Shaklee business with the understanding that he would not lose that business if he chose to supplement his income by selling other noncompeting products.

Requiring an offeree to take affirmative steps to reject any offer is inconsistent with general contract law. *Id.* at 1199. It was therefore improper for the lower courts to conclude that Giddens accepted Shaklee's purported contract modification as a matter of law.

The lower courts' reliance upon the provision in Giddens' written contract stating that Shaklee could cancel the contract if "any company rule" was violated is also misplaced. The courts decided that the agreement Giddens signed obligated him to abide by any company rule, not only those in effect at the time he signed. (Appendix 12-13.) In other words, the courts interpreted the term "any" to encompass future changes. The term "any," however, is not tense specific. The lower courts ignored Giddens' argument that "any company rule" does not encompass rules adopted in the future, particularly when the rule conflicts with the rule in effect when an agreement was signed. BLACK'S LAW DICTIONARY defines "any" as "often synonymous with 'either,' 'every,' or 'all.'" Neither "any" nor its synonyms are tense specific. BLACK'S LAW DICTIONARY also states that the generality of the term "any" "may be restricted by the context; thus, the giving of a right to do some act 'at any time' is commonly construed as meaning within a reasonable time." BLACK'S LAW DICTIONARY (5th ed. 1979). Given this patent ambiguity, it was improper for the courts to resolve the disputed issue of whether Giddens' contract was modified by the new P&R.

Where a contract is ambiguous – that is, susceptible of more than one construction – then summary judgment in an action on that contract is inappropriate. *International Bhd. of Elec. Workers v. Southern California Edison Co.*, 880 F.2d 104 (9th Cir. 1989). The contract between Giddens

and Shaklee is ambiguous. Shaklee could have easily avoided any ambiguity by providing that its distributors were bound by existing rules and "such rules that Shaklee may adopt in the future." However, Shaklee chose not to include such a provision in its distributor contracts. Because this appeal stems from the grant of summary judgment, and because summary judgment is inappropriate in this action involving an ambiguous contract, the lower courts erred in finding against Giddens on this point. A reasonable jury could conclude that the use of the term "any company rule" meant any company rule now in existence.

The lower courts also ignored the precatory statement in the unfair competition rule promulgated in the new P&R. The precatory language states that distributors "should" resign before soliciting any Shaklee members to join another direct sales organization. The lower courts also ignored the fact that the only direct prohibition contained in the unfair competition rule relates to the "promotion" of another direct sales company. Yet, Shaklee disavowed that Giddens was terminated for anything other than *solicitation* of Shaklee distributors to join other direct sales companies. Despite this conflicting evidence, the lower courts invaded the province of the jury by weighing evidence and inappropriately granted summary judgment.

The Restatement 2d of Contracts § 69(1)(a) (1979) provides that the failure to reply to an offer operates as an acceptance only "where an offeree takes the benefit of the offered services with the reasonable opportunity to reject them and with reason to know that they were offered with the expectation of compensation." In Giddens' case, there was no opportunity to reject, nor was

there any reason for Giddens to connect the attempted restriction on his right to sell other products to any consideration offered by Shaklee.

The lower courts' opinions can be construed to mean that consideration was offered when Giddens continued to perform and to accept bonuses and other benefits available to Master Coordinators. (Appendix 13, n. 3.) All of these benefits, however, were promised to and earned by Giddens long before the new P&R was promulgated. Furthermore, at no point did Shaklee attempt to tie its new restriction on outside sales to any new or different benefits. In fact, Shaklee's former Vice President of Sales has stated that total field compensation remained constant from 1976 through 1989. (CR 128; Perry dep., p. 91.) Shaklee's compensation to Giddens actually *declined* following the change in Shaklee's competition rule. (CR 118; Exhibit K.) Given these facts, the issue of whether consideration was offered for Shaklee's proposed contract modification was a genuine issue of material fact which should have been reserved for the jury.

The courts' conclusion that Giddens' silence constituted acceptance of its anti-competition rule should also be viewed in light of Shaklee's practice to exempt certain distributors whose involvement with Shaklee predates a major change in policy. For instance, in April 1988, Shaklee changed the minimum monthly purchase volume necessary to qualify as a sales leader from $2,000 to $3,000, but exempted certain Shaklee distributors from the change. (CR 128; Simon dep., p. 292.) In October 1989, Shaklee offered a free trip or $1,000 cash to those exempted sales leaders who agreed to be bound by the change. (CR 128; Simon dep., pp. 292-294.) A written agreement was presented to those sales leaders who

decided to be bound by the change. (CR 128; Exhibit X.) Sales leaders who chose not to sign the agreement continued to operate under the $2,000 purchase volume sales plan. (CR 128; Simon dep., p. 296.)

In contrast to Shaklee's exemption policy, Giddens was neither presented with an opportunity to reject the unfair competition rule nor was offered any consideration for Shaklee's attempt to bind him by its unilateral change. Therefore, Shaklee's claim that it can unilaterally change a distributor's contract is contradicted by its very own actions. At the very least, questions of fact exist over whether Shaklee's unfair competition rule was intended to apply to Giddens. Again, questions of contractual intent are issues of fact which are precluded from determination via summary judgment.

### B. Even Assuming that the Unfair Competition Rule Applied to Giddens, the Ambiguity in the Rule Precluded Summary Judgment.

In response to Shaklee's summary judgment motion, Giddens argued that even if the new P&R applied to him, it was self-contradictory and ambiguous. The district court rejected this contention in a one-sentence footnote. Despite the court's bald statement to the contrary, the new P&R simply stated that distributors *"should"* resign their Shaklee distributorships before soliciting any Shaklee members to join another direct sales organization. The rule says nothing about the consequences if a distributor chooses not to resign. Again, where an action is based on an ambiguous contract, summary judgment in such an action is inappropriate.

The pertinent portion of the non-competition rule provides as follows:

> Shaklee Family Members may not abuse their Shaklee distributorship by using it for the purpose of engaging in unfair competitive activity. In particular, if any Shaklee Family Members shift their interests toward building a sales organization in another direct selling company, then they should not masquerade as Shaklee members to gain access to other Shaklee members but should resign their Shaklee distributorship before soliciting any Shaklee members to join another direct selling organization. A Shaklee Family Member may not promote, directly or indirectly, another direct selling company or its products while remaining a Shaklee Family Member.

The contradiction within the rule is apparent. The first sentence appears to prohibit only competitive activity which is (a) an abuse of a Shaklee distributorship and (b) specifically intended to be unfair to Shaklee. The second sentence appears to anticipate a distributor's involvement in another direct selling company and ratifies such involvement so long as a distributor has not "shifted his interest" to another direct selling company, and so long as the distributor does not "masquerade" as a Shaklee member. The third sentence, if read out of context, makes the first two sentences meaningless, and purports to make even "indirect promotion" of another direct sales company a violation of Shaklee's rules, subjecting a distributor to termination.

The undisputed facts support Giddens' termination only if the third sentence of this rule is read out of context. However, rules of contract construction require that contract provisions be read together to decipher the contract's meaning. *See Colonial Sav. & Loan Ass'n v. Redwood Empire Title Co.*, 236 Cal. App. 2d 186 (1965). Because

of the apparent ambiguity within the anti-competition rule, the lower courts erred in granting Shaklee's motion for summary judgment.

When read together, the provisions of the anti-competition rule do *not* clearly prohibit selling of non-competitive products to other Shaklee distributors and recruiting those distributors to sell such products on a part-time basis. This conclusion is buttressed when the distributor in question continues to promote Shaklee and does not encourage Shaklee distributors to resign from Shaklee, but rather encourages them to pursue both multi-level ventures simultaneously.

Ironically, the district court recognized the ambiguity of the non-competition rule at a hearing held on Shaklee's Motion for Preliminary Injunction. The court stated as follows in denying Shaklee's motion:

> Section 4 is written in a rather gentle and kindly style. It doesn't exactly overwhelm you with the severity of the prohibition. It's more like a precatory direction.

(CR 77; Preliminary Injunction Transcript, p. 18.)

The district court's initial interpretation of the non-competition rule was correct. Shaklee cannot send mixed signals to its distributors about what is or is not a rule violation subjecting them to termination. This is an ambiguity, a question of fact, and a question of intent. As such, it should not have been decided via summary judgment. Even if Shaklee's unfair competition rule applied to Giddens, the jury should resolve whether that rule, when read in its entirety, precluded Giddens' conduct and justified his termination.

### C. Even if Giddens Violated Shaklee's Unfair Competition Rule, Shaklee's Discriminatory Enforcement of the Rule Precluded Summary Judgment.

According to Richard Perry, Shaklee's Vice President of Sales from 1985 to 1989, Robert Giddens is the only Master Coordinator who has been terminated by Shaklee, and the only distributor terminated for violating Shaklee's unfair competition rule. (CR 128; Perry dep., pp. 23-24.) Giddens identified over 90 Shaklee distributors whom he believes were involved in promoting products for other direct sales companies while remaining Shaklee distributors. Nearly all of these distributors are in the high ranks of Shaklee, including some Master Coordinators. Yet, while some of these distributors received threatening letters from Shaklee, none were terminated.

Giddens, on the other hand, was threatened with disciplinary action even prior to his involvement in ATR and Eagle Shield, neither of which sold products which competed with products sold by Shaklee. This fact supports Giddens' claim that his conduct caused no appreciable harm to Shaklee and that his termination may have been caused by his criticism of Shaklee management. Al Simon, who terminated Giddens, has admitted that he prepared a letter of discipline to deliver to Giddens for Giddens' criticism of management. (CR 119; Simon dep., p. 286.) (CR 118; Exhibit O.) According to Giddens, Simon also told another distributor that Simon was out to get Giddens. (CR 128; Giddens dep., p. 844.) Giddens also contends that he was singled out for discriminatory treatment based upon his criticism of management. (CR 128; Giddens dep., pp. 58-59.)

Giddens' allegations create a question of fact over the true reason for his termination. When a question of fact exists over the true reason for termination of a contract, the jury should be permitted to determine which reason is worthy of credence and whether that reason justifies termination. In fact, it has been held that the factual question of whether a defendant had "just cause" for terminating its contract with an employee presents a genuine issue of fact which precludes granting the defendant's motion for summary judgment. *Southern Int'l Sales Co. v. Potter & Brumfield Div. of AMF, Inc.*, 410 F. Supp. 1339 (S.D.N.Y. 1976). And yet, though the district court actually recognized that the motivation for Giddens' termination was a disputed issue of fact, the court nonetheless granted summary judgment against Giddens' contract claim. (Appendix 13-14, n. 4.) The lower court actually admitted that it was resolving a genuine issue of material fact which should have been presented to the jury.

**D. Even if Giddens' Noncompetitive Activities Provided Good Cause for Termination, the Lower Courts Erred by Ruling that Giddens Forfeited His Retirement Benefits by Engaging in Such Conduct.**

One aspect of Shaklee that induced Giddens to become a Shaklee distributor was Shaklee's lucrative retirement program. (CR 119; Giddens dep., p. 498.) Giddens was told that he could "retire" when he became a Key Coordinator. (CR 119; Giddens dep., p. 498.) Shaklee also publicized its retirement program in its Sales Manual. The Sales Plan effective in 1981 provided, "When you have held the rank of Coordinator for 12 consecutive

months, you may choose to retire." (CR 118; Exhibit H, SHO3386.) According to the schedule, Giddens' retirement benefits vested no later than 1973. (CR 118; Exhibit L.) Shaklee's retirement benefits[3] included the right to continued receipt of 50 percent of the bonus overrides from the retired distributor's first level Supervisors. (CR 119; Farren dep., pp. 160-161.) Giddens claimed entitlement to these retirement benefits in his proposed Second Amended Counterclaim. (CR 109; Counterclaim, ¶¶ 14, 17, 48, 55, 76.)

The lower courts' opinions do not explicitly address the issue of retirement benefits. In fact, the district court indicated during oral argument on Shaklee's motion that the retirement issue "may be a legitimate problem." (Appendix, p. 46.) And yet, despite the existing retirement issue, the district court issued its opinion dismissing the portions of Giddens' counterclaim alleging denial of retirement benefits.

California courts have consistently held that retirement benefits cannot be eliminated because an employee engages in competitive activity. *Muggill v. Donnelley Corp.*, 62 Cal. 2d 239 (1965); *Frame v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 20 Cal. App. 3d 668 (1971). The

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[3] Shaklee contended that distributors who are terminated are not entitled to retirement benefits. This issue was litigated in the case of *Shaklee Corp. v. Gunnell*, Case No.: C-78-022 6 A (C.D. Utah, December 16, 1981), *rev'd* 748 F.2d 548 (10th Cir. 1984). The unpublished decision of the district court was attached to counterplaintiff's Status Conference Statement. (CR 80.) However, the case was settled before the retirement issue was resolved. After the *Gunnell* litigation, the term "retirement" was dropped and the 1985 Sales Plan refers to this fringe benefit as the "residual bonus program." (CR 119; Farren dep., p. 155.)

Ninth Circuit has also recognized that the trustees of a pension plan cannot adopt a rule that deprives employees of retirement benefits because of an involuntary break in employment. *Lee v. Nesbitt*, 453 F.2d 1309 (9th Cir. 1972).

In this case, Giddens was promised retirement benefits at the time he signed his distributorship contract with Shaklee. Giddens then qualified for these retirement benefits by maintaining the rank of Coordinator for 12 consecutive months. (CR 118; Exhibit L.) Shaklee terminated these retirement benefits for the same reason that it terminated Giddens' distributorship contract: Giddens' purported violation of Section 4 of the 1985 P&R. Shaklee cannot condition Giddens' receipt of vested retirement benefits upon his continued loyalty to Shaklee. Nor can Shaklee classify Giddens' retirement income as a discretionary bonus after Giddens has qualified for payment of the benefit. *See Brug v. Pension Plan*, 669 F.2d 570 (9th Cir. 1982), *cert. denied* 459 U.S. 861 (1982) (retroactive changes to pension benefits are unenforceable against employees who have previously qualified for benefits).

Because Giddens complied with all conditions necessary to qualify for retirement benefits, because California law prohibits Shaklee from terminating Giddens' retirement benefits for his alleged competitive activity, and because the lower courts recognized that the retirement issue is a legitimate dispute, the lower courts' refusal to permit Giddens to assert a claim for such benefits was in error.

## CONCLUSION

This case is a profound example of the unlimited power the lower courts now believe they have in granting summary judgment. Though existing case law prohibits

summary judgment in a case such as this, the lower courts ignored that case law by weighing and resolving genuine issues of material fact. The most frightening aspect of this case is that the district court recognized and admitted that it was invading the reserved province of the jury, admitted that the contract between the parties was ambiguous and subject to multiple interpretations, and yet wrongfully granted summary judgment despite this awareness. If this Court declines the opportunity to limit the lower courts' unrestrained power, especially when those lower courts admit that they are resolving fact issues which should be reserved for the jury, then no case is safe from summary judgment, and the seventh amendment right to a jury trial is illusory.

WHEREFORE, Petitioner prays that a writ of certiorari issue from this Honorable Court to review the judgment of the United States Court of Appeals for the Ninth Circuit in Shaklee U.S., Inc. v. Robert G. Giddens, Jr. In the event that the Petition is granted, Petitioner prays that the judgment of the court below be reversed and that the cause be remanded.

Respectfully submitted,

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DATED: November 7, 1991

**APPENDIX A**

OPINIONS BELOW

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

| | |
|---|---|
| SHAKLEE U.S. INC., Plaintiff-Appellee, | CA No. 90-15498 |
| v | DC No. CV-88-1382-WWS |
| ROBERT G. GIDDENS, JR. Defendant-Appellant. | MEMORANDUM* [Filed May 30, 1991] |

Appeal from the United States District Court
for the Northern District of California
William W. Schwarzer, District Judge, Presiding
Argued and Submitted May 16, 1991
San Francisco, California

BEFORE: GOODWIN, SKOPIL AND CANBY, Circuit Judges.

Robert Giddens appeals the district court's grant of summary judgment in favor of Shaklee, Inc. on Shaklee's claim and Giddens' counterclaim for breach of contract. Giddens also appeals the district court's grant of summary judgment against Giddens on his claim of intentional interference with advantageous business relationships, and its denial of Giddens' motion to file a second amended counterclaim. We affirm.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

Background

Giddens acted as a distributor for Shaklee from 1970 until 1988, pursuant to a distributor agreement providing, inter alia, that "[i]f this agreement or any Company rule is violated, Shaklee products may cancel this distributorship. . . . "

In 1988 Shaklee terminated Giddens' distributorship after Giddens recruited other Shaklee distributors to become distributors for other non-competing direct sales companies. That termination was based on Giddens' violation of section 4 of Shaklee's "Statement of Privileges and Responsibiliities" ("P&R"), prohibiting Shaklee distributors from promoting another direct selling company "while remaining a Shaklee Family Member." That same provision expressly enumerates termination as a sanction for violation of section 4.

Shaklee brought this action seeking declaratory and injunctive relief against Giddens' continued promotion of other direct sale companies by recruiting other Shaklee distributors while remaining a Shaklee distributor himself. While this action was pending, Shaklee terminated Giddens. It then amended its action, seeking declaratory relief and damages for breach of contract. The district court granted summary judgment in favor of Shaklee on Shaklee's claims that Giddens had breached the distributor contract, and that Shaklee was authorized by that contract to terminate Giddens' distributorship. The district court denied summary judgment on contract damages, however, ruling that the amount of damages was too speculative to determine on the state of the record at that time. After the district court certified its summary

judgments under Fed. R. Civ. P. 54(b), Giddens appealed the grant of summary judgment on the breach of contract claims.

Shaklee also claimed damages for intentional interference with advantageous business relationships and sought recovery of mone for failure of consideration. The district court granted summary judgment in favor of Giddens on those charges, and those rulings have not been appealed.

Giddens counterclaimed for breach of contract, breach of fiduciary duty and the duty of good faith and fair dealing, conversion, fraud, intentional interference with advantageous business relationships, and unjust enrichment. The district court granted summary judgment against Giddens on all of his counterclaims, except his claim for conversion, for which it granted Giddens summary judgment, awarding him approximately $12,000. Giddens appeals the summary judgment awards on the breach of contract and tortious interference counterclaims.

Giddens sought leave to file a second amended counterclaim, which the district court denied. Giddens appeals that ruling.

## Discussion

### 1. Breach of contract

The District court properly ruled that Giddens was contractually bound to the provision in section 4 of the 1985 version of the P&R, entitled "Unfair Competitive Activity," which states that "[a] Shaklee Family Member

may not promote . . . another direct selling company . . . while remaining a Shaklee Family Member." That conclusion rests both on the provision in Giddens' original employment contract, binding him to "any company rule," and on Giddens' acceptance of that rule by continuing to perform and receive compensation after the promulgation of the rule and by complying with an enforcement of the rule against his earlier recruiting of other distributors for a different direct-sale company. Calif. Civil Code § 1621; *Caron v. Andrews*, 133 Cal. App. 2d 412, 416-17 (1955).

There was no genuine issue of material fact as to whether the rule was a binding contractual term, nor was there any dispute that the rule prohibits recruiting other Shaklee distributors for other direct selling companies, and that Giddens knowingly violated the rule. Giddens has offered no evidence sufficient to raise factual questions on these points. Thus, Shaklee was within its contractual rights in terminating Giddens' distributorship for breach of contract. Calif. Civil Code § 1689(b)(2); *Pennel v. Pond Union School Dist.*, 29 Cal. App. 3d 832, 838 (1973).

Giddens' argument that this rule is too ambiguous to be enforced is contradicted both by the language of the rule, and by Giddens' knowledge of its meaning and consequences. Giddens focuses on the "should resign" language of the rule as suggesting that the provision was merely precatory. That language, however, precedes the following unambiguous terms: "A Shaklee Family Member *may not* promote, directly or indirectly, another direct selling company or its products while remaining a Shaklee Family Member." (Emphasis added). Section 4 concludes with the provision that "[v]iolation of the

provisions of this Section by any Shaklee Family Members may subject their distributorship to any sanction specified in Section 5, including termination of their distributorship for cause." Giddens' other argument that the rule quoted above was merely prefatory to other more specifically enumerated rules, which could be enforced by termination, is contradicted by the plain language of section 4.

Finally, any ambiguity regarding those terms is contradicted by Shaklee's prior enforcement of the rule against Giddens regarding Giddens' promotion of K-Comp, with which Giddens complied, and Shaklee's repeated attempts, short of termination, to enforce the rule against his promotion of ATR and Eagle Shield.[1]

2. Tortious Interference

The district court granted summary judgment against Giddens on his counterclaim of intentional interference with advantageous business relationships, because the

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[1] Giddens' claims of retaliatory motive and uneven enforcement of the contract are irrelevant. Giddens cites no authority for the proposition that a materially breaching contract party may maintain as a defense against termination that the terminating party had a subjective motivation of animosity or reprisal towards the breaching party. *Toussaint v. Blue Cross & Blue Shield*, 292 N.W.2d 880 (Mich. 1980), is inapposite. The present case does not involve a factual determination whether general "good cause" exited for an employee's termination. Rather, this case involves contractual termination between a supplier and an independent distributor based on a breach of an express contract term, for which the contract expressly provided termination as a remedy.

requisite showing of intent was lacking. Additionally, the district court ruled that Giddens' allegations failed to establish the requisite showing that interference be either unlawful or lacking in sufficient justification. We agree.

Giddens insists that there is a disputed issue of fact as to Shaklee's intent in terminating his distributorship, yet he offers no relevant evidence, other than bare allegations, that the intent of Shaklee was anything other than to enforce its contractual right to prevent its distributors from recruiting other Shaklee distributors for other direct sales operations.

As we have already noted, an alleged intent to terminate Giddens as a reprisal for his criticism of Shaklee's management or policies does not deprive Shaklee of the right to enforce its contract terms. Neither does it render the disruption of Giddens' relationship with his downline distributors unlawful or lacking in sufficient justification to make out a claim of tortious interference. "The exercise of a contractual right cannot be the basis for a claim of tortious interference." *Computer Place, Inc. v. Hewlett-Packard Co.*, 607 F.Supp. 822, 835 (N.D.Cal. 1984), *aff'd* 779 F.2d 56 (9th Cir. 1985); *Accord Rickel v. Schwinn Bicycle Co.*, 144 Cal.App.3d 648, 660 (1983)

3. Denial of Leave to Amend

Giddens sought leave to file a second amended counterclaim, adding two allegations. First, Giddens' proposed second amended counterclaim alleged that section 4 of the P&R violates the public policy set forth in California Business and Professions Code, section 16600, which provides that "every contract by which anyone is

restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." Second, Giddens' proposed second amended counterclaim alleged entitlement to vested "retirement benefits." The district court denied leave to amend because such amendment would be futile. We agree.

a. Section 16600

California cases clearly establish that contractual prohibitions against current employees' competing with their employers do not violate section 16600. *See, e.g. Fowler v. Varian Assoc's Inc.,* 196 Cal. App. 3d 34, 44 (1987). The reasoning of those cases applies equally to supplier-distributor relationships such as that between Giddens and Shaklee, and Giddens has provided no authority suggesting otherwise. The relationship between section 16600 and post-termination anti-competition agreements is less clear, but that issue is not presented here. Amending Giddens counterclaim to add this allegation would have been futile.

b. Retirement benefits

Adding an allegation that Giddens was entitled to "retirement benefits" would also have been futile. The benefits to which Giddens claims entitlement are characterized in the 1985 P&R as "Residual Bonuses," and are described in section 39 of that document as "extended bonuses paid on the continuing performance of [downline distributors] after the Senior Coordinatorship has been approved for reduced activity status." ER 10 at 38. Section 29 goes on to provide that

> [p]articipation in the residual bonus program is available only to [those eligible, who] continue to meet the following qualifications:
>
> Comply with Shaklee rules and regulations; . . .
>
> * * *
>
> Continue to comply with all the provisions of Sections 3 and 4 throughout the duration of their special reduced activity status."
>
> Finally, Section 39 states that
>
> [r]esidual bonuses will cease if any member of the distributorship on reduced activity status violates Section 3 or 4, or enters into any business that conflicts with Shaklee, or engages in activities that discredit the Shaklee name or undermine the morale of other Shaklee distributors.

Giddens was bound by the terms of the 1985 P&R. He was in violation of Section 4. The express terms of the P&R thus demonstrate that amending Giddens' complaint to seek entitlement to these residual benefits would be futile. The district court did not abuse its discretion in denying leave to amend.

## Conclusion

The rulings of the district court are AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| SHAKLEE U.S., INC., Plaintiff and Counter-Defendant, | No. C-88-1382-WWS |
| vs. | MEMORANDUM OF DECISION AND ORDER |
| ROBERT G. GIDDENS, Defendant and Counter-Plaintiff. | (Filed January 19, 1990) |

Plaintiff Shaklee U.S., Inc., has brought this diversity action against defendant Robert G. Giddens, Jr., a former distributor of its products, for breach of contract, intentional interference with advantageous business relationship, and recovery of moneys for failure of consideration. Giddens has counterclaimed for breach of contract, breach of fiduciary duty and of the duty of good faith and fair dealing, conversion, fraud, intentional interference with advantageous business relationship, and unjust enrichment. Shaklee's prior motion for a preliminary injunction prohibiting Giddens from acting as a distributor for another direct-selling company while a distributor for Shaklee was denied. Both parties have now moved for summary judgment.

## I. Facts

The material facts are not in dispute. Shaklee is engaged in the distribution of nutritional and other

household products through a multilevel direct sale marketing system. Giddens became a Shaklee distributor in November 1970 when he executed the form of Special Agreement. (Fine dec. ex. J.) He advanced rapidly and by 1973 had attained the top level in Shaklee's distributor ranking system. In 1982, Giddens began to sell and recruit for K-Comp, another multilevel direct selling company, in addition to his activities for Shaklee. When Shaklee objected and told him his activities could jeopardize his rank and certain benefits with Shaklee, Giddens resigned from K-Comp as well as another direct selling company in which he had been participating. (Giddens dep. 155, 158-164; Fine dec. ex. G.)

In November 1987, Giddens began selling and recruiting distributors for another direct selling company, Advanced Tax Representation, Inc. ("ATR"). While continuing as a Shaklee distributor, Giddens recruited a number of ATR distributors from among his Shaklee distributors. Approximately 80% of the people Giddens succeeded in recruiting as ATR distributors were Shaklee distributors. (Giddens dep. 190, 199-200, 202, 280-282, 301.) In late February 1988, Giddens became a distributor for an additional direct selling company, Eagle Shield, a distributor of insulation materials, and recruited distributors from among Shaklee distributors. Approximately 80% of the people Giddens contacted about Eagle Shield were Shaklee members. (Giddens dep. 301, 376-77, 384, 386-87.) Almost immediately after Giddens took on ATR, Shaklee advised him that it was concerned that he was in violation of its rules and warned that disciplinary action would be taken against him if he did not comply with the rules. (Fine dec. ex. L; Giddens dep. 589-90.) In January

1988, Shaklee advised Giddens that it considered him no longer to be using his best efforts to promote Shaklee (Fine dec. ex. M), and in March it advised him that it was "considering appropriate disciplinary action affecting your distributorship including termination," based on Giddens' solicitation of other Shaklee members on behalf of ATR. (Fine dec. ex. N.) Giddens was demoted in April 1988 at the same time this action was filed. This Court denied Shaklee's motion for preliminary injunction on May 20, 1988, and on July 6, Shaklee terminated Giddens' distributorship based on his continued solicitation of Shaklee members for ATR and Eagle Shield. (Fine dec. ex. P.)

## II. Discussion

### A. Shaklee's Complaint Against Giddens

#### 1. The Contract Claim.

The "Distributorship Application / Special Agreement" form executed by Giddens provided: "If this agreement or any Company rule is violated, Shaklee Products may cancel this distributorship (including all rights to discounts and bonuses) by sending written notice to that effect."

Shaklee's rules include the Statement of Privileges and Responsibilities ("P&R"). The 1985 P&R, in effect when Giddens was terminated, states that it

> "regulates Shaklee sales policy, and, at the same time, reflects the Shaklee Philosophy. It prescribes the guidelines, procedures, and corporate policies that govern the way the Home Office and Field sales force work together. [It]

> outlines the *privileges* you, as a Shaklee Sales Leader, can expect from the Corporation and the *responsibilities* the Corporation expects you to assume at every level of sales leadership."

(Farren dec. ex. C at 3.) (emphasis in original)[1] Section 4 of the P&R (the "Unfair Competition" provision) provides that Shaklee distributors "should resign their Shaklee distributorship *before* soliciting any Shaklee members to join another direct selling organization . . . [and] may not promote . . . another direct selling company or its products while remaining a Shaklee Family Member." (*Id.* at 10.) It also requires distributors to "continue to use their best efforts to promote Shaklee and otherwise fulfill all the leadership responsibilities of their Shaklee sales rank . . . . " Section 4 further provides that violation "may subject [a distributor] to any sanction specified in Section 5, including termination of their distributorship for cause." Section 5, in relevant part, provides that "[v]iolation of the provisions of the P&R by any Shaklee Family Members may result in immediate termination of their distributorship for cause in addition to any other legal remedies available to Shaklee." (*Id.* at 12.)[2]

There is no question that the P&R, including the amendments adopted subsequent to November 1970, is binding on Giddens. The Special Agreement he signed

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[1] Earlier editions of the P&R contained similar statements.

[2] Earlier versions of the P&R (starting with the 1982 version) contained similar prohibitions. *See* Farren dec. ex. B at 10 (1984 P&R); ex. A. at 9 (1982 P&R, which appears to forbid only the solicitation of other Shaklee members, not mere participation in other direct selling organizations.).

obligated him to abide by *"any* Company rule", not only those in effect at the time he signed. In addition, Giddens performed under and accepted the benefits of the contractual arrangement between him and Shaklee for 18 years without protest or reservation. There is no dispute that Giddens knew the contents of each version of the P&R from January 1971 on. He cannot now be heard to limit his consent to those provisions that now suit him.[3] Thus there is no question that Shaklee was entitled to terminate Giddens for violation of section 4, in light of his admitted activity soliciting Shaklee members to join ATR and Eagle Shield.[4] Shaklee is therefore entitled to

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[3] Giddens contends that the 1982 P&R (which first included the Unfair Competition provision) represented a modification of the contract, that there was no consideration offered by Shaklee to support the added duties imposed upon Giddens, and that therefore section 4 is unenforceable. By this reasoning, no other modification of the P&R over the past 18 years – including those which conferred additional benefits upon Giddens – would be enforceable. Such an approach makes no sense in the context here of a long-term ongoing contractual relationship in which both parties have performed continuously despite periodic modifications of their duties. Giddens has offered no facts to show why he was powerless to resign from Shaklee or commence legal action at the time of the 1982 revisions. Giddens neither resigned nor sued, but instead continued to perform, and to accept the bonuses, bonus car, travel, and other benefits which were available to "Master Coordinators" who demonstrated "outstanding loyalty to Shaklee," including observance of the "Unfair Competition" rule. (1982 P&R at 17; Farren dec. ex. A.) He can not now object to this provision.

[4] Contrary to Giddens' contention (Giddens Opp. at 8-10), no reasonable jury could find that section 4 was ambiguous in

(Continued on following page)

summary judgment on its claim for declaratory relief in the First Count.

2. The Restitution Claim

In the Third Count, Shaklee seeks to recover all cash bonuses received by Giddens from Shaklee and ATR since the time of his breach of contract (but no latter than September, 1987), and in any event since this action was filed in April, 1988. Shaklee's theory appears to be that Giddens was not entitled to these payments once he breached his contract. Having made those payments with full knowledge of Giddens' allegedly improper activities, however, Shaklee has no right to require Giddens to

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(Continued from previous page)

its prohibition against soliciting Shaklee members for other direct selling companies.

Giddens further contends that his involvement with other direct selling companies was not the true reason for Shaklee's decision to terminate his distributorship, but that the termination rather was motivated by a long-standing feud between Giddens and Shaklee management. While Giddens has produced evidence that Shaklee was upset with his frequent public criticism of Shaklee management, and that other Shaklee distributors who were involved with other direct selling companies were not terminated by Shaklee, the relevance of this contention to Shaklee's breach of contract claim is not clear. Since Giddens was in violation of Section 4, Shaklee had the right to terminate his distributorship. Giddens' sole citation for the proposition that the jury should decide the true reason for the termination and whether that reason justifies termination, *Toussaint v. Blue Cross and Blue Shield*, 408 Mich. 579, 292 N.W.2d 880, 896 (1980), a case discussing for-cause termination in the employment context, is inapposite here.

restore them. Shaklee elected to treat its contract with Giddens as in force, and the Court accordingly has found that Shaklee is entitled to its ascertainable damages for Giddens' breach (see section 3, below). While California Civil Code § 1692 states that "[a] claim for damages is not inconsistent with a claim for relief based on rescission,"[5] it also provides that "such relief shall not include duplicate or inconsistent items of relief." To permit Shaklee to recover its payments to Giddens in these circumstances would ignore the value of the services performed by Giddens for Shaklee after Shaklee became aware of his breach but chose not to terminate his distributorship, and would be inequitable. *See, e.g., St. Regis Paper Co. v. Royal Industries,* 552 F.2d 309, 313-14 (9th Cir. 1977) (under section 1692, restitution is discretionary with the trial court); *Runyan v. Pacific Air Industries, Inc.,* 2 Cal. 3d 304, 85 Cal. Rptr. 138 (1970). Moreover, Giddens continued to serve as a Shaklee distributor during this period,[6] and Shaklee accepted the benefits of his services; it thus cannot now claim a failure of consideration.

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[5] Section 1692 thus loosens the strict rules regarding election of remedies which had previously existed. *See, e.g., Jozovich v. Central California Berry Growers Ass'n,* 183 Cal. App. 2d 216, 6 Cal. Rptr. 617, 626 (1st Dist. 1960) ("In the case of breach of contract [the injured party] may treat the agreement as alive and effective suing for damages for breach, or he may assume the contract dead and proceed to obtain restitution. But damages and restitution constitute alternative remedies and an election to pursue one is a bar to invoking the other.").

[6] It is undisputed that Giddens actively continued to promote Shaklee and its products until his termination. Giddens dep. at 45; Simon dep. at 246; LaRue dep. at 66.

Shaklee contends that it did not intend to waive its claim to recover the bonuses paid to Giddens, especially those paid after April 12, 1988 when Shaklee filed this action and sent Giddens a letter stating that his "Special Leadership Bonuses will be continued temporarily pending resolution of our action to terminate your Distributorship." (Giddens ex. S. at 2.) This contention is irrelevant in light of the facts that Shaklee chose not to terminate Giddens at that time despite knowledge of his breach, Giddens continued to perform on behalf of Shaklee, and Shaklee continued to accept the benefits of his performance, and to pay the bonuses due. Thus, whether or not Shaklee intended to waive its claim to the bonuses, it is not entitled to them. Nor does Shaklee point to any basis for its claim for payments received by Giddens from ATR, and is not entitled to them, even if Giddens was in breach of contract. Accordingly, Giddens is entitled to summary judgment on Shaklee's Third Count.

3. Damages

In its damage claim, Shaklee also seeks damages for loss of sales, competitive position and goodwill. This claim, though in contract, appears to be based on allegations in the second count to the effect that by soliciting Shaklee distributors to divert their efforts to ATR sales, Giddens adversely affected their sales and sponsorship efforts for Shaklee. Since it is not contended that ATR or Eagle Shield offered products competitive with any of Shaklee's, all that is involved here is the possible dilution of sales and sponsorship effort devoted to Shaklee products. Shaklee has submitted the declaration of L. Thomas

Dowling purporting to quantify the resulting loss – approximately $33,000. The claim is highly speculative, but whether the proffered evidence would be admissible at a trial cannot be determined on the present record. The parties' motions for summary judgment on the issue of damages under the First Count will thus be denied.

4. The Tortious Interference Claim.

Shaklee alleges that by promoting ATR and Eagle Shield's product and business opportunity among its distributors and soliciting them, Giddens disrupted its advantageous relationship with them. But as Shaklee correctly points out in moving to dismiss the same claim by Giddens, to establish liability for tortious interference, "[m]otive or purpose to disrupt ongoing business relationships is of central concern in a tortious interference case, and a strong showing of intent is required to establish liability." *Rickards v. Canine Eye Registration Found., Inc.*, 704 F.2d 1449, 1456 (9th Cir. 1983).

At best, the evidence can be read to infer that Giddens intended to persuade some Shaklee distributors to become involved in another direct selling opportunity, that he represented to them that they would be better off in ATR or Eagle than in Shaklee, and that Giddens could reasonably foresee that those Shaklee distributors whom he successfully recruited into ATR or Eagle might devote less time or effort to Shaklee. To prevail, however, Shaklee must show " '*intentional* acts on the part of the defendant *designed* to disrupt the relationship" between Shaklee and its distributors. *Seaman's Direct Buying Serv., Inc. v. Standard Oil Co.*, 36 Cal. 3d 752, 766, 206 Cal. Rptr.

354, 361 (1984) (quoting *Buckaloo v. Johnson,* 14 Cal. 3d 815, 827, 122 Cal. Rptr. 745, 752 (1975)) (emphasis by *Seaman's* court). A breach (or harm to the economic relationship) that is "merely an incidental, if foreseeable consequence" of Giddens' actions, does not demonstrate that Giddens "acted with the purpose or design of causing" the sub-distributors to reduce their activity on behalf of Shaklee. *Id.* There is nothing in the record to demonstrate that Giddens requested his ATR and Eagle recruiters to drop Shaklee or to reduce their Shaklee activities.

Even if Shaklee could prove intent, it would be barred from recovery by the clear absence of any improper motive behind Giddens' actions. *Id.* There is no genuine dispute that Giddens' [sic] was motivated solely by a legitimate desire to increase his income; there is no evidence that Giddens wished to harm Shaklee or cause it to lose money.[7] "Where the actor's conduct is not criminal or fraudulent, and absent some other aggravating circumstances, it is necessary to identify those whom the actor had a specific motive or purpose to injure by his interference and to limit liability accordingly." *DeVoto v. Pacific Fid. Life Ins. Co.,* 618 F.2d 1340, 1347 (9th Cir. 1980). While Giddens' competitive actions in soliciting other Shaklee distributors were a breach of his own contract, justifying his termination and Shaklee's recovery of contract damages, there is no evidence that they were criminal, fraudulent or otherwise so highly improper as to

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[7] *See* Simon dep. at 252-53, 272; Giddens dep. at 610. Note also that as long as Giddens remained a member of Shaklee he had a pecuniary interest in its success and the success of his sub-distributors.

warrant a remedy in tort. Giddens is entitled to summary judgment on the Second Count.

B. Giddens' Counterclaim Against Shaklee.

1. Claims for Breach of Contract and of Fiduciary Duties and the Covenant of Good Faith and Fair Dealing

Giddens claims that his termination was in breach of the November 1970 special agreement. For the reasons stated in support of the granting of summary judgment on Shaklee's first claim, Shaklee is entitled to summary judgment on the contract claim. It follows that summary judgment must also be entered on the claims for breach of fiduciary duties and of the duty of good faith and fair dealing.[8]

2. Conversion Claim.

Giddens alleges that Shaklee withheld funds due him for sales made and bonuses earned during the month preceding his termination on July 6, 1988. To prevail on his claim for conversion, Giddens must show that he "had the right to possess the withheld money at the time

[8] In any event, no tort damages would be available here for breach of the covenant. *Premier Wine & Spirits v. E & J Gallo Winery*, 846 F.2d 537, 540 (9th Cir. 1988) (no tort damages for breach of the covenant between distributor and supplier). Under California law, there is no fiduciary duty between a manufacturer and its distributors. *E.g., C. Pappas Co., Inc. v. E & J Gallo Winery*, 610 F. Supp. 662, 667 (E.D. Cal. 1985), *aff'd*, 801 F.2d 399 (9th Cir. 1986).

of the conversion and that [Shaklee] willfully and without legal justification interfered with th[at] right." *Otworth v. Southern Pac. Trans. Co.*, 166 Cal.App. 3d 452, 458, 212 Cal. Rptr. 743, 746 (1985); *see also Weiss v. Marcus*, 51 Cal. App. 3d 590, 599, 124 Cal. Rptr. 297, 303 (2d Dist. 1975) (specific sum of money owing, capable of identification, may be subject of conversion action). As discussed above, Shaklee is entitled to damages attributable to Giddens' breach of contract. Until July 6, however, Shaklee elected to treat the contract as continuing and effective, and it accepted the benefits of Giddens' continued performance. Shaklee was thus "without legal justification" in withholding from Giddens whatever sums he was contractually entitled to receive.

Section 27 of the 1985 P&R provides that "Shaklee Special Leadership Bonuses are privileges earned by Senior Sales Leaders for exemplifying loyalty to Shaklee. . . . For this reason, Shaklee reserves the right to withhold some or all of the Special Leadership Bonuses for dereliction of responsibilities or misuses of the privileges of sales leadership," and along with section 26 makes clear that violation of section 4 may result in reduction of the Special Leadership Bonuses. Further, these bonuses are available only to distributors ranked Senior Supervisor or higher, and the letter of April 12, 1988 demoted Giddens to Supervisor.

That same letter, however, specified that Giddens' Special Leadership Bonuses "will be continued temporarily pending resolution of our action to terminate your Distributorship," and Shaklee paid the bonuses for April and May. Giddens continued to perform for Shaklee until

his distributorship's termination in July. Under these circumstances, Giddens clearly had a contractual right to his June Special Leadership Bonuses, and is entitled to them. There is no dispute that Shaklee has interfered with Giddens' possession of the money. Giddens is entitled to judgment on the conversion claim in the amount $12,121.91 plus interest.

3. Fraud Claim.

Giddens alleges that Shaklee falsely represented to him that he would be permitted to participate in other direct sales companies, concealed its intent to alter the P&R, and misrepresented its intent to enforce the unfair competition rule. This claim is barred by the three year statute of limitations for fraud actions. Cal. Code Civ. Pro. § 338(4). Giddens' claim for fraud accrued no later than 1982, when he was required by Shaklee to resign from K-Comp and thereby learned that Shaklee would enforce the unfair competition rule against him. The claim is also barred by laches since Giddens has known of the unfair competition rule since its adoption in 1981 and has consented to it by acceptance of the benefits of his distributorship without protest. Further, Giddens has offered no facts to show any intent by any representative of Shaklee to defraud Giddens, or that Shaklee had knowledge of the falsity of the statements at the time they were made.[9] Shaklee is entitled to summary judgment on this claim.

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[9] Giddens has testified that as of 1970 only Lee and Forrest Shaklee, Jr. might have had the intent to defraud members of

(Continued on following page)

4. Intentional Interference with Advantageous Business Relationships.

Giddens alleges that through its representations and publications about him to Shaklee members, and its termination of his distributorship, Shaklee interfered with Giddens' relationship with the sub-distributors he recruited. Because the requisite showing of intent to interfere is missing, as heretofore discussed (*see* pp. 9-10, above), Shaklee is entitled to summary judgment on this claim. In addition, because Shaklee's termination of the distributorship represented a legitimate exercise of its contractual rights, any interference does not meet the requirement that the interfering action be accomplished "either by unlawful means or by means otherwise lawful when there is a lack of sufficient justification." *Hamro v. Shell Oil Co.*, 674 F.2d 784, 789 (9th Cir. 1982).

5. The Unjust Enrichment Claim.

Giddens claims that by terminating him, Shaklee unjustly retained the benefit of his 18 year association with it. To prevail on an unjust enrichment theory, Giddens must show "the existence of a res (property or some interest in property), the plaintiff's right to that res, and the defendant's gain of the res by fraud, accident, mistake, undue influence, the violation of a trust or other

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(Continued from previous page)

the sales force. But Giddens' suppositions about their culpable intent is based solely on Giddens' feelings about their personalities and business practices generally. (Giddens dep. at 804-05.)

wrongful act." *Santa Clarita Water Co. v. Lyons*, 161 Cal.App. 3d 450, 460, 207 Cal. Rptr. 698, 702 (2d Dist. 1984); Cal. Civ. Code § 2224. Here, Shaklee's "gain", if any, was a result of its termination of Giddens' distributorship pursuant to its contractual right. Thus, the necessary element of a "wrongful act" is lacking. Moreover, Giddens has failed to demonstrate how the benefits of his 18 years of effort promoting Shaklee and his network of distributors can be construed as a "res", or why he, rather than Shaklee, would be entitled to it upon his termination. Shaklee is entitled to summary judgment on this claim.

C. Motion to Amend Counterclaim.

Giddens has sought leave to file a second amended counterclaim alleging that section 4 of the P&R violates the public policy set forth in California Business and Professions Code section 16600 which provides that "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." The amendment would be futile because section 4, as it was applied in this case, did not restrain Giddens in the conduct of his business. Shaklee terminated him simply for soliciting, while a Shaklee distributor, other Shaklee distributors to participate in another direct sale company. Section 16600 clearly is not intended to prohibit a company from protecting itself against interference with its distributor organization by one of its own current distributors. *See, e.g., Loral Corp. v. Moyes*, 174 Cal.App. 3d 268, 279-80, 219 Cal. Rptr. 836, 843-44 (6 Dist. 1985) (termination agreement forbidding

former employee to raid former employer's current employees not void under § 16600); *Fowler v. Varian Associates, Inc.*, 196 Cal.App. 3d 34, 43-44, 241 Cal. Rptr. 539, 545 (6 Dist. 1987) (section 16600 does not authorize an employee to assist his employer's competitors). Leave to amend is denied.

III. Conclusion.

For the forgoing reasons, all claims will be dismissed as specified in this order, with the exception of Shaklee's claim for damages for breach of contract and Giddens' claim for conversion of his June bonuses.

IT IS SO ORDERED.

DATED: January 19, 1990

/s/ William W Schwarzer
WILLIAM W SCHWARZER
United States District Judge

## APPENDIX B

## STATUTES INVOLVED

**RULE 56. Summary Judgment**

**(a) For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

**(b) For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

**(c) Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

**(d) Case Not Fully Adjudicated on Motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining

the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

**(e) Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

**(f) When Affidavits are Unavailable.** Should it appear from the affidavits of a party opposing the motion

that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

**(g) Affidavits Made in Bad Faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

## APPENDIX C

JUDGMENTS BELOW

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| SHAKLEE U.S. INC., | ) | |
| Plaintiff-Appellee, | ) | CA No. 90-15498 |
| v | ) | DC No. CV-88-1382-WWS |
| ROBERT G. GIDDENS, JR. | ) | ORDER |
| Defendant-Appellant. | ) | |

BEFORE: GOODWIN, SKOPIL AND CANBY, Circuit Judges.

The petition for rehearing is denied.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| SHAKLEE U.S., INC., Plaintiff, v. ROBERT G. GIDDENS, JR., Defendant. | No. C-88-1382-VRW<br>JUDGMENT<br>(Filed March 19, 1990) |
| ROBERT G. GIDDENS, JR., Counter-Plaintiff, v. SHAKLEE U.S., INC., Counter-Defendant. | |

An order having been entered herein on January 22, 1990, granting summary judgment on various claims asserted by the parties to this case, and the Court having certified that there is no just reason for delay and expressly directing the entry of final judgment, it is,

ADJUDGED as follows:

THAT, defendant and counterclaimant Robert G. Giddens, Jr. ("Giddens") breached his distributorship contract with Shaklee U.S., Inc. ("Shaklee"), and Shaklee justifiably terminated Giddens' contract, entitling Shaklee to declaratory judgment in its favor on the First Count of its First Amended Complaint.

THAT, Shaklee is entitled to take nothing under the Second Count of its First Amended Complaint, Damages for Intentional Interference with Advantageous Business Relationship, and said claim is dismissed on its merits.

THAT, Shaklee is entitled to take nothing under the Third Count of its First Amended Complaint, Common Count – Recovery of Money for Failure of Consideration, and said claim is dismissed on its merits.

THAT, Giddens is entitled to take nothing under his counterclaim for Breach of Contract, Count A of Giddens' First Amended Counterclaim, and said counterclaim is dismissed on its merits.

THAT, Giddens is entitled to take nothing under his counterclaim for breach of Fiduciary Duty and Duty of Good Faith and Fair Dealing, Count B of Giddens' First Amended Counterclaim, and said counterclaim is dismissed on its merits.

THAT, judgment is is [sic] hereby entered in Giddens' favor in the amount of $12,121.91, plus interest, only, on his counterclaim for Conversion, Count C of Giddens' First Amended Counterclaim.

THAT, Giddens is entitled to take nothing under his counterclaim for Fraud, Count D of Giddens' First Amended Counterclaim, and said counterclaim is dismissed on its merits.

THAT, Giddens is entitled to take nothing under his counterclaim for Intentional Interference With Advantageous Business Relationships, Count E of Giddens' First Amended Counterclaim, and said counterclaim is dismissed on its merits.

THAT, Giddens is entitled to take nothing under his counterclaim for Unjust Enrichment, Count F of Giddens' First Amended Counterclaim, and said counterclaim is dismissed on its merits.

THAT, each side is to bear its own costs and attorneys' fees.

Dated: March 19, 1990 /s/ Wynette S. Dailey
Clerk
United States District Court

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEFORE: The Honorable William W. Schwarzer, Judge

| | | |
|---|---|---|
| Shaklee U.S., Inc., | ) | C-88-1382 WWS |
| Plaintiff, | ) | San Francisco, CA |
| vs. | ) | January 19, 1990 |
| Robert G. Giddens, Jr., | ) | |
| Defendant. | ) | |

TRANSCRIPT OF PROCEEDINGS

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[p. 2] FRIDAY, JANUARY 19, 1990

THE CLERK: Calling Civil 88-1382, Shaklee U.S., Incorporated, vs. Robert Giddens, Jr. Counsel, please step forward and state your appearances, please.

MR. GLAZIER: Good morning. Brad Glazier appearing on behalf of the defendant and counter-plaintiff, Robert Giddens.

THE COURT: Good morning.

MR. POPOFSKY: Good morning, Your Honor. Larry Popofsky and Robert Hawk on behalf of Shaklee, plaintiff and counter-defendant.

THE COURT: All right.

Did you want to make an appearance?

MS. SAMEIRE: Carolyn Samiere appearing on behalf of Richard Fine & Associates for defendant Robert Giddens.

THE COURT: Okay. Is everybody happy with my proposed ruling?

MR. GLAZIER: We are not, Your Honor.

THE COURT: You're not. All right. Well, let's see, I'll hear from you, Mr. Glazier, then.

MR. GLAZIER: Your Honor, as –

THE COURT: I thought both sides were winning in this case.

MR. GLAZIER: Both sides are winning a little bit, Your Honor.

THE COURT: Well, but you're – you're winning on your [p. 3] motions for summary judgment.

MR. GLAZIER: Well, we are winning, I guess, on – on two-thirds of our motion for summary judgment, but the essence of the case as we see it involves the breach of contract that is claimed by Giddens –

THE COURT: Okay.

MR. GLAZIER: – Versus – Versus the claims that have been raised by Shaklee.

THE COURT: So what – what's wrong with this ruling?

MR. GLAZIER: Your Honor, we do appreciate the opportunity to address the specific points and authorities that you have raised in your proposed opinion, and essentially what I'd like to do today is to go over very specifically the statements of fact that are not included in the opinion, that we think are material, and which should be statements which you conclude in favor of Shaklee, as a matter of law, which we conclude or will argue are questions of fact that should be resolved by the jury, and also a number of legal points that we conclude respectfully were decided erroneously.

THE COURT: I'm not sure – what do you have in mind here? Is this a lengthy – I see you've got a big black

notebook. What – what are you planning to do at this hearing?

MR. GLAZIER: Well, Your Honor, how much time will I have available for argument?

THE COURT: Well, let's say seven minutes.

[p. 4] MR. GLAZIER: Let me turn very quickly, then, to the arguments of – pertaining to questions of fact that are not included in the opinion.

THE COURT: Are you saying there are material facts that should have been in the opinion that would change the outcome?

MR. GLAZIER: Yes, Your Honor.

THE COURT: On the contract claim?

MR. GLAZIER: Yes, Your Honor.

THE COURT: How could that be?

MR. GLAZIER: Well, let me turn to the first point –

THE COURT: Okay.

MR. GLAZIER: – Which is Giddens' involvement in the Amway Corporation and the fact that Giddens was – asked specifically at the time that he joined Shaklee whether or not he could continue in the Amway business. We think those are material facts, in that he specifically asked about his ability to be involved in more than one multilevel company, and was specifically told in 1970, when he joined Shaklee, that he could in fact be involved in more than one.

THE COURT: But the contract is clear, and he signed the contract. There's no uncertainty about it,

because you get – you pay your money and you make your choice.

MR. GLAZIER: I guess, Your Honor, we have a disagreement about whether or not the contract is ambiguous or [p. 5] not.

THE COURT: Where's the ambiguity?

MR. GLAZIER: Well, Your Honor, it really – it really falls in two categories. Number one, there is a conclusion that is made by the Court that because the contract says that – that Giddens is obligated to follow any of the rules that are promulgated by Shaklee, that that means both rules in existence now and rules that may be promulgated in the future.

THE COURT: There's no question about that. And Giddens lived with this contract for, what, 18 years? And accepted all of the benefits. When they complained to him about – and he didn't – he didn't try to continue as an Amway member, as I understand it. He did not.

MR. GLAZIER: No.

THE COURT: No. So for a long time, he didn't have any other business. Then he went and took on – was it – the first one was ATR, was it? Oh, K-COMP. And they said "You can't do it," so he dropped it. Now 18 years later he says, "I always had the right to continue as an Amway distributor, and you can't do this to me." That doesn't make any sense. That's not a jury issue.

MR. GLAZIER: He was specifically told, Your Honor, that he had a right to be involved in more than one multilevel company.

THE COURT: Then what happened when – with K-COMP?

[p. 6] MR. GLAZIER: He decided for personal reasons that he would get out of K-COMP. And, Your Honor, we believe that's a question of fact as well.

THE COURT: I don't think it is. He certainly never told them, "I have a right to do this, but I'm only going to do what you're asking me to for personal reasons, not because – not because I don't have a right to do it."

MR. GLAZIER: If you look at the exhibit that was presented by Shaklee, there's no mention made in his so-called letter of resignation that he was getting out because of any threats that were made by Shaklee. He's just saying that for personal reasons he's decided to get out of the business.

THE COURT: Okay. What else do you have?

MR. GLAZIER: With respect to the ambiguity of the contract, Your Honor, I think it's – it may be helpful to turn back to some statements that this Court made in the transcript on the preliminary injunction hearing, because on page 18, in reference to section 4, the Court stated, quote:

> "Section 4 is written in a rather gentle and kindly style. It doesn't exactly overwhelm you with the severity of prohibition. It's more like a prefatory direction."

THE COURT: Well, those are prefatory words, made – expressed at a time when I had just gotten the case and hadn't studied it.

[p. 7] MR. GLAZIER: Well, Your Honor, it's – it's the same language that was presented to you in the context of the preliminary injunction hearing that you're making an interpretation upon today. And we do believe that that language is essentially prefatory. It talks about things that you should do; it talks about things that are not good for distributors or for Shaklee. And then in the last provision, the last sentence of section 4, it includes the very specific comments about what you cannot do, and which may result in some ambiguous type of disciplinary action.

If you read –

THE COURT: There's nothing ambiguous about this language, about what the company can do.

MR. GLAZIER: Well, Your Honor, in the preliminary injunction hearing, you said that it was because there was no specific mention of termination in the context of section 4 that you had to read section 5 to find out what happens of you violate section 4.

THE COURT: Well, now I've read section 5.

MR. GLAZIER: Your Honor, essentially, what I had hoped to do today was to point out 10 specific material questions of fact that are not included in the opinion, and we've already talked about three of them.

THE COURT: Why don't you give me a memorandum on the 10 matters that you think raise issues of fact. I don't think [p. 8] that lends itself too well to oral argument. I mean, the point of oral argument is to come up with the distilled essence of your position, and not a – not a shopping list of – of factual matters.

MR. GLAZIER: Let me turn, then, to what we see as – as really the linchpin of Shaklee's motion for summary judgment, and that is, the whole issue of whether or not a manufacturer can make unilateral changes in its handbook and have those changes apply retroactively to a distributor –

THE COURT: Retroactively.

MR. GLAZIER: Well, sure.

THE COURT: They're applied from the date that they became – they went into effect, which was around 1980, I guess, or '81.

MR. GLAZIER: Well, they – they apply retroactively in the sense that at the time that Giddens joined the company, he was specifically told that he could be involved in more than one multilevel company. And the allegation from his side is that he relied upon that representation, and that he was specifically told that rule 4, once it came into existence, was unenforceable. he says that Larry Farren, who is currently with Shaklee in their legal department, specifically told him that.

[p. 9] THE COURT: How did he rely on it? He relied on it 18 or 19 years later by taking on an additional line?

MR. GLAZIER: No, he didn't rely on it 18 or 19 years later. This representation was made after section 4 was promulgated.

THE COURT: Which was when, in 1980, '81?

MR. GLAZIER: Well, it was promulgated in 1981, and 1982 is when it actually found its way into the handbook. And then it was simply sent to distributors,

and they had no choice as to whether or not they would accept or reject the change.

THE COURT: He never complained about it once until this lawsuit.

MR. GLAZIER: He was told it was not enforceable, Your Honor. He was specifically told it would not be enforced against him.

THE COURT: Somebody made an oral statement to him?

MR. GLAZIER: That's right, Your Honor.

THE COURT: And then two years later they enforced it against him? The first time he took up a competing line, ATR, they enforced it against him? He didn't say a thing about his having been told that they wouldn't enforce it against him. This is an afterthought.

MR. GLAZIER: There – there's no statement of that sort in the record, Your Honor, that he – he did not make that statement.

[p. 10] THE COURT: There's no statement that he did.

MR. GLAZIER: That's true, Your Honor.

THE COURT: There's no evidence that he ever raised the issue of that, quote, promise having been made to him until these briefs were filed.

MR. GLAZIER: Well, it was made prior to the time that these briefs were filed, Your Honor. It's been in – it was said in depositions. Mr. Giddens' deposition was taken on five days, and in a number of those days he

made that statement. But I don't think that the law imposes upon him an obligation to indicate everything that he's going to say in response to the decision that was made to terminate him.

THE COURT: No, but if you want to allege reliance, you've got to have evidence of it, and there isn't any evidence of reliance.

MR. GLAZIER: Your Honor, let me – let me turn to the two decisions which we think are probably the most important decisions, and which are not discussed in the Court's opinion, and that is the Thompson decision, which we have cited in our brief. There's a long discussion about that. And Thompson is a decision which discusses the issue of whether or not an employer can, by unilaterally promulgating a new handbook, have those provision apply to people that were with the company prior to the time that the handbook was issued. And the Thompson decision, under very similar facts, held that mere retention of [p. 11] benefits and knowledge of the change is not sufficient to constitute acceptance.

THE COURT: Well, that's an Eastern District of Virginia, in some kind of a fact-specific case.

MR. GLAZIER: Your Honor, we think the – the only – the only factual distinction between that case and this case is that that involved an employment situation, and this involves a distributorship situation.

THE COURT: It's pretty fundamental.

MR. GLAZIER: Well, it is a – it is a distinction, Your Honor. However, the Court relied upon Corbin on contracts, and essentially said, as a general rule of contract

law, you cannot amend a contract in this way if you don't give the party that you're suggesting the amendment to the opportunity to reject, and if you don't give any consideration.

It has also been followed, Your Honor, by a decision that's called Roth vs. Square D Corporation. The cite is 712 F.Supp. 1231, and that's a district court decision out of South Carolina. It's a 1989 decision.

Now, admittedly, neither one of these decisions are from California, and we don't propose to argue that they are binding on this Court.

THE COURT: They don't even apply.

MR. GLAZIER: However –

THE COURT: They don't even apply.

[p. 12] MR. GLAZIER: And why not, Your Honor?

THE COURT: Well, take the Eastern District of Virginia case.

MR. GLAZIER: Uh-hum.

THE COURT: That's a case that stands, as I understand it, for the basic proposition that when an employee is hired, he's hired on certain terms, and you can't later change those terms and make him an at-will employee, and say "Now I'm going to fire you because you're an at-will employee." But that's not this case at all. In this case, person entered into a distributorship agreement, at the time said that "I will subscribe to the rules of the company." Not the rules now in effect, but to the rules of the company." Not the rules now in effect, but to the rules of

the company. The rules were changed in 1981. He never complained about it. He went right on. When the rules were enforced, he didn't complain about it; he complied. The first time he complains about it is when he gets in this row in 1988 with Shaklee, and that's the first time all of this comes up. It's got nothing to do with the situation where an employee is hired on specific terms, and then the company tries to change the terms of his employment.

MR. GLAZIER: Your Honor – Your Honor, one of the positions that we're going to take in this lawsuit is that there were specific terms in this contract. One of those terms was that you can be involved in more than one multilevel if you want. And that's in fact what Giddens was involved in at the [p. 13] time that he joined the company. There's no question that that rule was changed, and there's no – there's at least a question of fact regarding the consideration that was offered.

The Court says in its – in its opinion that consideration was offered. However, Shaklee doesn't even claim that there was any consideration that was specifically tailored to this provision. And in fact one of their own company officials, the vice president of sales, has said that the compensation has not changed whatsoever from 1976 to the present.

THE COURT: Well, I think I get your point. I get your point. I don't agree with it, but I understand it.

MR. GLAZIER: Your Honor, then let me – I know that there's some other cases here, and I – I don't want to take too much of your time. Let me address for a moment the motion to amend, which was a motion that we filed

sometime ago to amend our counterclaim to add a provision pertaining to – pertaining to section 16600 of the California Business & Professions Code.

Your Honor, in the opinion, this is treated essentially as a summary judgment issue, and we would respectfully state that unless it can be concluded that this argument is totally futile, that at least that portion of the claim should remain in.

THE COURT: Well, I agree with you that that should be the standard, and I consider it totally futile.

[p. 14] MR. GLAZIER: Let me address that issue, then, Your Honor.

There is a statement in – in the court's opinion, and let me quote it. It says on page 16:

> "Section 16600 clearly is not designed to prohibit a company from protecting itself against interference with its distributor organizations by one of its own current distributors."

And That's at page 16.

THE COURT: Yes,

MR. GLAZIER: The case support for it, and there's two cases that are cited, are both employer/employee cases. Previously in the opinion the Court says that employee/employer decisions are not relevant to this case, because it's a distributorship case.

But, in any event, with respect to 16600 specifically, it's clear that employment cases are not relevant because of Shaklee's statement in its distributorship application

that its distributors are not only not employees, they're not even agents of the company.

And, Your Honor, we cited a case that's called hygenic specialities in our brief on the motion to amend. The cite for that is 302 F.2d 614. It's a second circuit decision dated 1962 –

THE COURT: What has that got to do with 16600?

[p. 15] MR. GLAZIER: Well, 16600 is a very broad statement. It basically says that any contracts by which anyone is prohibited from engaging in a business or trade are void. And the employment decisions say that if you're an employee, you cannot engage in any activity that is competitive with your employer, because you have a fiduciary duty to your employer. What the hygenic specialities case says is that in some distributorship cases, where the distributor does not claim that there's a fiduciary relationship, does not claim an agency principal relationship, then that distributor does have the ability to compete.

And, Your Honor, because Shaklee is specifically –

THE COURT: They're not talking about competing. They're not saying he can't compete. What they're saying is he can't go around to the Shaklee distributors and ask them to sign up for this other line, because it disrupts their organization. That's all they're talking about. Maybe we're not talking about the same case.

MR. GLAZIER: Well, perhaps we're not talking about the same issue, because I believe that he was terminated based on Section 4, which prohibits not only trying to solicit Shaklee distributors become involved in some

other activity, but precludes them from becoming involved in any other direct-sales –

THE COURT: That's not –

[p. 16] MR. GLAZIER: – Company.

THE COURT: That's not what he was terminated for. He was terminated because he was raiding Shaklee's distributors, which is covered by section 4. And these cases are squarely on point. They're all 16600 cases.

MR. GLAZIER: They're 16600 cases, Your Honor, dealing with employees. Not one distributorship case –

THE COURT: Same principle.

MR. GLAZIER: And there's not one case that deals with a nonagent/nonemployee.

Your Honor, that is my position on –

THE COURT: All right.

MR. GLAZIER: – the motion to amend.

THE COURT: All right.

MR. GLAZIER: There is one issue that is not discussed in the opinion whatsoever, and that is the retirement issue.

THE COURT: Well, I didn't find any material on that. I think that may be a legitimate problem, but I certainly didn't find it in the briefs.

MR. GLAZIER: Right. There's no mention in Shaklee's brief or Giddens' brief on that issue.

THE COURT: So what do you want me to do about it?

MR. GLAZIER: Well, I guess I would suggest that you – and I would listen to – to what Shaklee wants to do with respect to this issue. It's raised in paragraphs 14 through 17 [p. 17] of Giddens' first amended counterclaim.

THE COURT: I think –

MR. GLAZIER: If the court is going to conclude that Shaklee has a right to modify its contract to take away benefits –

THE COURT: No, I didn't –

MR. GLAZIER: – I guess the same analogy would apply –

THE COURT: I never concluded that.

MR. GLAZIER: – to the retirement issue.

THE COURT: That's not the issue at all. There's no question about taking away benefits. I think that you and counsel for Shaklee should sit down and work out what the contractual rights are that carry forward, that Mr. Giddens has. It may well be that he's got some rights – accumulated rights on which he's entitled to recover. I didn't address that issue because it wasn't briefed. But I think before we even bring it to the court, I think you and opposing counsel should sit down and see if you can work that out.

MR. GLAZIER: Well, I doubt that it's something that can be worked out. I think that Shaklee's position, and they can correct me if I'm wrong –

THE COURT: Why not?

MR. GLAZIER: – Is that those retirement benefits are cut off at the time of termination.

[p. 18] THE COURT: Well, let's find out. I don't know.

MR. GLAZIER: Perhaps we can submit a supplemental brief on that issue, Your Honor.

THE COURT: Well, let's see what Mr. Popofsky says about it.

MR. GLAZIER: Thank you, Your Honor.

THE COURT: Thank you very much.

All right, Mr. Popofsky.

MR. POPOFSKY: It is Shaklee's position that there are no such things as vested retirement benefits, and that those contractual rights were terminated with a proper for-cause termination. That's not to say that Shaklee's been unwilling to sit down and talk with Mr. Giddens about this situation.

THE COURT: Um-hum.

MR. POPOFSKY: Indeed, it was our hope when we received the proposed memorandum of decision and order that we could do so. I did invite counsel to have such a colloquy, and he advised me that it was their intent simply to appeal.

THE COURT: Well –

MR. POPOFSKY: To which – to which all I can say is, God bless and good luck, and we would ask for a 54(B) inclusion in the order, because there's no point going

forward with the trial if the plaintiff believes himself aggrieved and feels that he wants to challenge on appeal. If the – if this is affirmed on appeal, there will be no trial, in my estimation.

[p. 19] THE COURT: Well, I don't see anything to try in this case anyway. It's preposterous. This is just a case of mutual harassment, couple of people got mad at each other, and we're talking about peanuts, $33,000 of speculated damages.

Now, I'm willing to look at the question of the retirement benefits, because I'm not sure Shaklee's right on that, but I think what you ought to do is – I think I'll refer you to a magistrate and try to get this case settled. If you can't get it settled, taking into account the retirement benefits, whatever position you want to take, then I will be glad to address that issue as a legal matter on the retirement benefits, and then we can see whether we can find a way to enter final judgment, so that the court of appeals can deal with these questions. But it's ridiculous; it's a complete waste of money for everybody. And I'm not going to let this be used a – as a speculative venture to try to convert it into some kind of a gambling scheme. And on the other hand, I'm not going to let Shaklee pursue Mr. Giddens either with a lot of claims that I think are basically unwarranted. So I think you ought to settle this case as soon as possible.

But if you want to address any of the legal issues, Mr. Popofsky, I'd be glad to listen.

MR. POPOFSKY: Obviously, our view is congruent with Your Honor's. Once the termination was effective,

and declared effective, it seems to us it is a case of much to do about [p. 20] nothing.

As to the legal questions, I think Your Honor has said most everything that I would have said on 16600. The employment cases are the only ones that are roughly analogous, but if plaintiff's view were correct, then the whole of the law of vertical restraints would be inoperative in California, and that plainly is not so. Vertical restraints are validly enforced in California all the time. And what we have here is a form of vertical restraint post sylvania.

As for the Thompson decision, if Your Honor wishes, we have half a dozen California cases, employment cases, in which manuals have been updated and held to bind, unlike Thompson.

THE COURT: It just depends.

MR. POPOFSKY: It depends on the facts.

THE COURT: I don't think you can convert – retroactively convert a contract to an at-will employment.

MR. POPOFSKY: Absolutely not.

THE COURT: All right.

MR. POPOFSKY: On the other hand, the updating of distributional policies by way of manual is standard in the employment context in California, and there are cases to that effect, which we did not cite, but which we could –

THE COURT: No, I don't want anymore cases.

MR. POPOFSKY: – Provide.

As for Your Honor's prefatory language during the [p. 21] injunction proceedings, as I recall those, they were offered as a test of the proposition we were then advancing, and that your honor's decision in the end was predicated on the notion that Shaklee had self-help and did not need the assistance of the court. To my mind, that language has always been clear. Certainly there's no parol evidence interpreting the language that has been offered by anybody, and we think Your Honor's opinion is correct in every respect which we prevailed on, and probably correct, I hasten to say, in those which we lost, but –

THE COURT: Well, it's rare that you're so fortunate to have both sides arguing the same issue on the – on the interference with advantageous relationship. And citing the same law against each other makes life very simple.

MR. POPOFSKY: Well, we were cautions about it, and we argued it. The intent point, we noted, was a difficult point for our point of view.

THE COURT: While we're here, just take a minute, what is the section you're relying on for the retirement benefit claim? Do you have it in mind offhand? I just wanted to –

MR. GLAZIER: Yeah.

THE COURT: – Look at this.

MR. GLAZIER: If I can just take a moment.

THE COURT: Do you know, Mr. Popofsky?

MR. GLAZIER: I'll know in a second.

[p. 22] MR. POPOFSKY: No, I don't –

THE COURT: Mr. Hawk, do you have it there?

MR. POPOFSKY: The subject was –

MR. HAWK: Section 27 –

MR. POPOFSKY: Fortunately, Mr. Hawk has it.

MR. GLAZIER: It is Exhibit – Exhibit T –

THE COURT: I'm looking at the P&R.

MR. GLAZIER: Right, the '85 P&R, Your Honor.

THE COURT: Okay.

MR. GLAZIER: And it would be section 39, I believe. Yes, section 39 is now called the residual bonus program. At the time that Mr. Giddens signed up, it was the retirement program.

THE COURT: Let me just take a look at it.

Oh, well, it's pretty long.

(Pause in proceedings)

THE COURT: It says here:

> "Under the Shaklee residual bonus program there is no funding of benefits and no vesting or interests."

MR. POPOFSKY: We think it's clear, but you may recall that plaintiff's counsel sent Your Honor a decision in Nevada –

THE COURT: Yes, I recall.

MR. POPOFSKY: – The Gunnell (phonetic) case, which was then vacated in the Tenth Circuit and reversed.

THE COURT: It was in Utah, not Nevada.

[p. 23] MR. POPOFSKY: Utah. You're quite right. Salt Lake City. My geography is confused.

But in any event, we would have assumed if there was any claim that counsel wanted to put before Your Honor, that on summary judgment motions it was – it was up to plaintiff to bring – bring them forward. On the other hand, we're prepared to do battle on them now, by way of briefing or anything else.

MR. GLAZIER: Excuse me, Your Honor, if I could just respond to that. The reason that it wasn't brought up is because I didn't seek summary judgment on that issue. Shaklee had sought summary judgment on the breach of contract issue. That would, I guess, include retirement benefits, but it's nowhere mentioned in – in the briefs.

THE COURT: Offhand, it doesn't seem to me like it's much of a claim, but I could be wrong on it. I think you ought to sit down and see if you can work this out. I mean, after all, what – you know, what does Mr. Giddens have to gain from this, except to have lawyers do a lot of work on a contingency, which is pretty remote. And on the other hand, I think Shaklee has established its basic principle, and I don't see any point in continuing from your point of view, and I certainly don't want to devote the resources of the federal court to a kind of pointless grudge battle. So go ahead and try to settle it. I'll set it for another status conference in three months.

MR. POPOFSKY: Thank you, Your Honor.

[p. 24] MR. GLAZIER: Your Honor, if I can make –

THE COURT: Yes.

MR. GLAZIER: – One more point. I guess we should enter some sort of opinion or judgment at this point in time. I have prepared a judgment in favor of Mr. Giddens for $12,191.91, and also an order which includes a provision with respect to section – 28 USC, section 1292(B), regarding the fact that this order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal . . . may materially advance the ultimate termination of the litigation," and I would ask that that be entered. Apparently Shaklee is in – in agreement with me on – on that question, that we should take –

MR. POPOFSKY: I surely wouldn't –

MR. GLAZIER: – this issue up to the Court of Appeals.

MR. POPOFSKY: I surely wouldn't do it under 1292. I would do it under 54(B), if Your Honor thought it appropriate, but it can be done, as Your Honor wishes, now or it can be done in three months. As far as we're concerned, there's no reason to have a trial.

THE COURT: What about the $12,000? You're not –

MR. POPOFSKY: Well, I'd love to argue with Your Honor about that –

THE COURT: All right.

MR. POPOFSKY: – But, frankly, this case was never [p. 25] about $12,000, obviously,

THE COURT: I think I'll defer entering a judgment in the hope that maybe this will focus people's efforts on trying to get this thing settled, rather than on getting

ready for an appeal, and I will set it for a status conference on March – let's say March 23rd. We can change it, but just so we have a date on which you'll come back and report on the efforts to settle this case. I'm really serious. I don't want to devote the scarce resources of the federal court to this case.

MR. GLAZIER: Well, Your Honor, Mr. Giddens was paid over $2 million in the 14 years that he was with Shaklee, and he expects, if he prevails in this case, to receive approximately two million more dollars under the terms of his contract. And this issue –

THE COURT: He does?

MR. GLAZIER: – Ultimately will end up in the court of appeals. But we're happy to go along with any sort of scheduling conference that the court desires.

THE COURT: I think Mr. Giddens needs a lawyer to get him to think realistically about his position. If he's thinking about $2 million, he really has another thought coming.

Okay. I'll set it for March 23rd.

MR. GLAZIER: Thank you, Your Honor.

THE COURT: Thank you.

MR. POPOFSKY: Thank you.

[p. 26] THE CLERK: What time?

THE COURT: 10:00.

(Proceedings Adjourned)